UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.478
2 June 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 478th MEETING

Held at Headquarters, New York,
on Monday, 11 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

Draft legal guide on international countertrade transactions (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference Services, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 3.20 p.m.

DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS (continued) (A/CN.9/362 and Add.1-18; A/CN.9/XXV/CRP.3 and 4)

Chapter X (A/CN.9/362/Add.10)

1. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the words "or 'Europe'" in paragraph 12 had replaced the phrase "or 'Eastern Europe'", which had seemed entirely too general.

2. Mr. BONELL (Italy) said that his delegation thought that the wording of the last sentence of paragraph 25 could be improved. It might not be appropriate to say that "the parties would be obligated to review the affected restriction", since, to his knowledge, no legal system obliged parties to review such restrictions in cases of hardship or major change in circumstances.

3. The CHAIRMAN said that note would be taken of that point in the final drafting.

4. Chapter X, as amended, was approved.

Chapter XI (A/CN.9/362/Add.11)

5. The CHAIRMAN noted that in some countries the amount stipulated in a penalty clause could not exceed the principal amount. Likewise, in some countries, if a penalty clause was inserted in a contract, no claim for damages could subsequently be made. He suggested that wording which reflected those situations should be added to paragraph 7, after the third sentence.

6. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) suggested that the Secretariat should be given the choice of inserting wording to that effect in paragraph 7 or in paragraph 12.

7. It was so decided.

8. Mr. AZZIMANE (Morocco) noted that while paragraph 1 dealt with liquidated damages clauses and penalty clauses, paragraph 2 was introductory in nature. He therefore proposed that the order of the two paragraphs should be inverted. He also sought clarification as to the distinction being made between liquidated damages clauses and penalty clauses.

9. The CHAIRMAN said that the title of the chapter reflected the common-law distinction between liquidated damages and penalty clauses. Perhaps the Drafting Group might wish to use the lexicon published by the International Chamber of Commerce, which contained accepted equivalents for more than 2,000 legal terms.

10. Mr. LEVY (Canada) explained that the distinction between the two terms, in theory if not always in practice, was that liquidated damages involved a genuine pre-assessment by both parties of the financial effect of incomplete performance of the contract, while a penalty clause involved a more arbitrary fine or penalty for failure to perform.

11. Mr. BONELL (Italy) questioned the advisability of using the lexicon to which the Chairman had referred, since the translations it contained sometimes applied only to common law or to civil law. The use of both "liquidated damages" and "penalty clauses" had in fact been decided on so that the reader would not get the false impression that the text applied to only one legal system.

12. Mr. DUCHEK (Austria) recalled that in the early 1980s UNCITRAL had adopted Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, which might be helpful in drafting the current provisions.

13. Mr. CHATURVEDI (India) suggested that it might be appropriate for the terms in question to be defined at the beginning of the chapter.

14. The CHAIRMAN said that as the two concepts were not directly related to countertrade, providing explicit definitions would accord them undue importance and was in any case unnecessary, since the terms were defined in context.

15. Mr. LEVY (Canada) suggested that the concern of the representative of Morocco might be met by revising the title of chapter XI to include wording previously used by UNCITRAL, i.e. "Agreed sum due upon failure of performance".

16. Mr. EL-SHARKAWY (Egypt) said that, usually, liquidated damages were assessed if fault could be proved on the part of the debtor, while penalty clauses applied irrespective of fault. In Egyptian law, however, fault had to be proved in both cases. Because of the distinction established in some legal systems between failure to perform an obligation and default, he suggested that the words "a default" should be added after the phrase "a failure by a party to perform a specified obligation" in paragraph 1.

17. Mr. BONELL (Italy) welcomed the suggestion made by the representative of Egypt, but said that if the Commission decided to address the whole matter of liquidated damages and penalty clauses the process might be very lengthy, given that it had already taken a very long time to reach consensus on the preliminary draft. The precise nature and effect of such clauses would in any case vary from one State to another, and the provisions were not peculiar to countertrade. The text did not lend itself to more general considerations.

18. Mr. KOMAROV (Russian Federation) said that, with regard to paragraph 6, it would be useful to add a provision to the effect that damages could be paid in the form of deliveries of goods rather than money.

19. Mr. BONELL (Italy) said that further consideration would have to be given to the merits of such a rule. It might not be wise to accord a party the unilateral right to offer commodities in lieu of the monetary amount agreed upon in the liquidated damages or penalty clause.

20. Mr. KOMAROV (Russian Federation) suggested that his proposal could be included in a milder form. If the text was left unchanged, end-users of the guide could experience delays in situations in which there was not enough money to fulfil an obligation.

21. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that there were two possibilities: the agreed amount of liquidated damages could be expressed in goods rather than in money, a step that would require research to determine what was allowable under different legal systems; or the agreed amount could be expressed in money and the payment clause could provide for the possibility of the debtor delivering goods instead of paying money.

22. Mr. KOMAROV (Russian Federation) said that he preferred the second option; the parties would know ahead of time that damages could be paid in the form of the supply of goods of equivalent value. The liquidated damages or penalty clause would be expressed in money, but the parties could agree in the contract that equivalent payment in commodities or other goods was acceptable.

23. Mr. LEVY (Canada) said that that suggestion could give rise to many problems. The aggrieved party might not want to receive goods instead of money. Furthermore, if such a provision was included in the guide, even in the form of a suggestion, users might assume that it was meant to be a standard provision, which would be desirable; the purpose of paragraph 6 was to provide compensation for the aggrieved party in transferable currency. If the amendment was introduced, the Commission would be creating a form of countertrade which had not even been contemplated in the original agreement.

24. Mr. CHATURVEDI (India) said he supported the proposal made by the representative of the Russian Federation. It was very common for developing countries to experience foreign-exchange difficulties. It would thus be useful to indicate that even if the parties had agreed that damages would be paid in foreign exchange, they could, if the situation changed, consider repayment in the form of commodities.

25. Ms. BUURE-HAGGLUND (Observer for Finland) said that she was opposed to the inclusion of the new provision. Obviously, parties could always substitute goods for cash, but that would be a very unusual manner of dealing with liquidated damages. The proposed provision could create confusion.

26. Mr. BONELL (Italy) said he disagreed that the provision would meet a common need of developing countries. In his experience, penalty clauses were typically invoked by an exporter who, after having sold goods, often to a developing country, was no longer willing to accept a counterimport. Thus the

(Mr. Bonell, Italy)

proposed provision would be in the interests of the exporter rather than of developing countries.

27. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that a large number of contracts containing penalty clauses had been reviewed, and they provided almost exclusively for payment by the party from the developed country, typically in the form of a commitment to buy goods in the future. If the Commission wished to add such a provision, it could indicate that, if difficulties arose when payment of liquidated damages fell due, the parties might consider replacing the obligation to pay by an obligation to perform a service or deliver goods.

28. Mr. ARONOFF (United States of America), referring to section D of chapter XI, said that it would be logical to move paragraph 21 so that it followed paragraphs 22 and 23.

The meeting was suspended at 4.30 p.m and resumed at 5.05 p.m.

Chapter XII (A/CN.9/362/Add 12)

29. Mr. EL-SHARKAWY (Egypt), referring to paragraph 9, asked whether his understanding of the last sentence was correct, namely, that the obligated party did not have the option of not fulfilling the underlying obligation and asking the guarantor to pay the guarantee.

30. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said it was the party who suffered loss as a result of a failure to fulfil a contractual obligation who had the option of claiming payment under the guarantee; accordingly, the obligated party could not release himself from his obligation by having the guarantee amount paid.

31. Mr. LEVY (Canada) said he understood the purpose of the sentence, but questioned whether it was necessary. It was difficult to understand how an obligated party who had obtained a guarantee from a bank or from another financial institution would have a choice. The guarantee came into effect only if the obligated party was prevented from fulfilling his obligations; if he could fulfil them, he must do so.

32. Mr. BONELL (Italy) said that he was not entirely in agreement with the Canadian representative. The purpose of the sentence was not to refer to the relationship between the guarantor and the guaranteed party, but to serve as a reminder that if a party did not fulfil its obligation towards the other party, thereby provoking a call of the bond by the obligee, that party was not really making a choice. The obligor would still be required to pay the amount charged by the bank, which would be less convenient than fulfilling the original obligation. In strict economic terms, it was always better to fulfil an obligation; however, where a party, because of other considerations, preferred to pay the penalty for non-fulfilment, it should be entitled to do so.

33. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that a situation could be envisaged in which the liquidity damages covered by the guarantee would be relatively low, so that as a result of subsequent price developments, a party might find it more advantageous to have the guarantee called than to purchase the goods which were the subject of the contract. The sentence was intended to make it clear that the party would not have that option. Of course, in the situation which he had described, specific performance was rarely possible; it was more of a theoretical possibility.

34. Mr. LEVY (Canada) said that the sentence was not unclear, but superfluous. In the case of a building contract, for example, where performance was guaranteed by a financial institution and the contractor defaulted, the financial institution would, if possible, take over the contract and ensure that it was fulfilled. Where there was a guarantee, the guarantor would insist on performance so as to avoid having to pay.

35. Chapter XII was approved.

Chapter XIII (A/CN.9/362/Add.13)

36. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that in paragraph 1, some editorial changes had been made after the document had been issued: the words in brackets "(sections B and C)" should read "(section B)", "(section D)" should read "(section C)", and "(section E)" should read "(section D)".

37. Mr. ARONOFF (United States of America), referring to paragraph 11, said that he had difficulty with the term "pre-contractual liability". The question of pre-contractual liability might arise in the case of supply contracts; however, in the case of the countertrade commitment itself, contractual liability was involved. The purpose of the paragraph might be to indicate that if monetary damages could not be assessed, there was no enforceable contract.

38. Mr. BONELL (Italy) agreed that where a breach of a contractual obligation occurred, contractual liability could be invoked. In some cases, however, pre-contractual liability was involved: for example, where a countertrade commitment foresaw only a commitment in principle, as shown by the use of such terms as "best efforts" and "negotiating in good faith". In that case, if a party did not use his best efforts, the type of liability involved would be pre-contractual liability, since no contract had been concluded. Accordingly, he suggested that the sentence should be amended to read "The problem of liability for failure to fulfil a countertrade commitment may also raise the question of pre-contractual liability".

39. Mr. ARONOFF (United States of America) agreed to the proposed amendment.

40. Mr. LEVY (Canada) said that, for the purposes of further clarification, the following phrase should be added after the words "pre-contractual liability": "while in other jurisdictions, an agreement to agree is not enforceable in law."

41. The CHAIRMAN said that, if he heard no objection, he would take it the Commission wished the secretariat to take note of the proposed amendments.

42. It was so decided.

43. Mr. BONELL (Italy), referring to paragraph 9, said that the third sentence was unnecessary and should be deleted.

44. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) drew attention to the first sentence of the paragraph, which stated that the termination of a contract might be subject to certain conditions. He recalled that the Commission had discussed whether the United Nations Convention on Contracts for the International Sale of Goods was applicable to a countertrade agreement, since it might be argued that a countertrade agreement was not a definite sales contract, but merely preceded a definite contract. The same considerations could apply to the rules governing the termination of definite contracts.

45. Ms. BUURE-HAGGLUND (Observer for Finland) said that she understood the doubts expressed by the representative of Italy. The sentence as it stood was unclear and should be deleted.

46. The CHAIRMAN suggested that, in order to remove any doubts, the sentence should be deleted.

47. It was so decided.

48. Chapter XIII, as amended, was approved.

Chapter XIV (A/CN.9/362/Add.14)

49. Ms. BUURE-HAGGLUND (Observer for Finland) said that the beginning of paragraph 2 should be amended to read "in most national laws, the parties are permitted", since it would be exceptional for a choice-of-law clause not to be accepted. In the second sentence of paragraph 5, it would be preferable to replace the words "may govern the transfer of ownership" by the words "usually governs the transfer of ownership", since it would be highly unusual if the law in question did not apply.

50. Mr. EL-SHARKAWY (Egypt) said that the word "may" was more appropriate, since it was not true that the law applied in all cases.

51. Mr. LEVY (Canada) said that he supported the amendment to paragraph 5 proposed by the observer for Finland, since the word "may" was not strong enough.

52. Mr. BURMAN (United States of America) said that the words "the bank holding funds" in paragraph 5 should be replaced by the words "the bank issuing a guarantee or counter-guarantee", since the bank holding the funds might be a different one. In addition, the words "may govern disposition of the funds" should read "usually governs disposition of the funds", since the law in question was a general rule which applied in many legal systems.

53. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the text did not refer to the functions of the bank as a guarantor but as the holder of an account.

54. Mr. DUCHEK (Austria) agreed with the Finnish proposals concerning paragraphs 2 and 5. It was true that the autonomy of the parties had become widely accepted and that the principle was incorporated in most national laws. In paragraph 5, however, the important point was not to say that in many legal systems the lex situs applied to the law of ownership, but rather that there was no possibility for the parties to deviate from that law. He felt that the drafting could be improved in order to reflect that concern.

55. Mr. LEVY (Canada) said that it would be possible to combine the proposals made by the representatives of Finland and Austria by amending the text to read: "For example, regardless of the choice by the parties, the law of the State where goods are situated will usually govern the transfer of ownership of those goods; the parties cannot opt out of such laws".

56. Mr. EL-SHARKAWY (Egypt) said that in some cases the transfer of ownership was governed by the law of the State where the contract of sale was executed. It would therefore be more appropriate to retain the word "may".

57. Mr. BONELL (Italy) agreed with the representative of Egypt that the text should remain as it stood. He understood the concerns expressed by the representative of Austria but was reluctant to adopt a hard and fast rule saying that the parties could not opt out. It was necessary to reflect the fact that different approaches were followed in different States.

58. Ms. BUURE-HAGGLUND (Observer for Finland) said it was apparent from the discussion that the text as it stood was not clear. She was willing to accept the solution proposed by the representatives of Austria and Canada and to entrust the exact wording to the secretariat.

59. Mr. CHATURVEDI (India) said he was in favour of retaining paragraph 5 in its existing form.

60. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said it was possible that some States took a more liberal approach to the question of the disposition of funds than they did to the transfer of ownership and that they allowed the parties a greater freedom of choice.

61. Mr. LEVY (Canada) said that he could not accept the paragraph as it stood. He was not aware that any States took a more liberal approach to the question of disposition of funds. In most States, laws on the disposition of funds held in a bank were just as stringent as other aspects of the law governing transfer of property. It would be very unusual for a State to allow the laws of another State to be applied to its banking system. He therefore felt that the use of the words "most States" was justified in both cases.

62. The CHAIRMAN suggested that the representatives of Canada, Austria and Egypt and the observer for Finland should meet with the secretariat to produce an acceptable text.

The meeting rose at 6.15 p.m.